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No. 07-662

IN THE
SUPREME COURT OF THE UNITED STATES

AARP; JACK W. MACMILLAN; FRANK H. SMITH, JR., FRANK A. WHEELER; FRED DOCHAT; GERALD FOWLER; M. ELAINE CLAY,
Petitioners,

v.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,
Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the Third Circuit

REPLY BRIEF FOR THE PETITIONERS

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PETITIONERS' REPLY BRIEF

The fundamental issue raised by the Petition is whether the EEOC has the authority to issue a regulation that authorizes employers to eliminate health care benefits to more than ten million retirees nationwide aged sixty-five and older, notwithstanding the undisputed fact that Congress unambiguously prohibited that very form of age discrimination. In an effort to avoid review, the Respondent seriously understates the true nature of the regulatory exemption at issue. Respondent's opposition, however, underscores the conflicts presented by the extreme (and unprecedented) position urged by the EEOC in this rulemaking challenge.

ARGUMENT

1. Contrary to the Respondent's Claim, the Challenged Exemption is not "Narrow" In Any Respect. The rulemaking record shows that as many as ten million individuals are directly affected by the challenged rule. Pet. at 4-5. The challenged rule permits employers to arbitrarily eliminate *all* health care benefits for those individuals at age 65, notwithstanding the undisputed fact that the employer cost for coverage drops precipitously at age 65 precisely because of the availability of Medicare. *See* Pet. at 3-4. The scope of the exemption is broad and complete.

2. The Very Premise for the Challenged Rule is Unsupported. The EEOC suggests that the premise for the challenged rule was that "*many employers*...followed a long-standing practice" of discontinuing health care benefits at age 65 (Opp. at 2; emphasis added), notwithstanding the fact that such a practice admittedly was in direct violation of the ADEA. It is simply not true that "many employers" were long engaged in the discriminatory practice of eliminating health care benefits at age 65. In discovery in the district court, the EEOC *conceded* that it had no knowledge of how many employers did, or did not, comply with Congress' command of non-discriminatory health care benefits. *See* Pet. C.A. Br. at 47 & n. 6.

The EEOC's faulty factual premise exposes the fundamental illogic of the rule itself. Rather than identifying and targeting the employers who, prior to the exemption, were still not in compliance with the ADEA (Opp. at 3-4), the rule allows all employers – including all those who have been providing non-discriminatory health care benefits – to engage in arbitrary age discrimination against individuals aged 65 and older. The EEOC's logic is akin to permitting the Environmental Protection Agency to exempt from the Clean Air Act all factories nationwide on the ground that an unknown minority may not yet be in compliance. Thus, contrary to the claim that the challenged rule is consistent with the ADEA's primary purpose of "protecting older workers," the record demonstrates that quite the opposite is true. Indeed, none of the ADEA's three articulated purposes set

forth in 29 U.S.C. § 621(b) are served by the challenged rule. Pet. at 28-30.

3. The Respondent Ignores the Sharp Conflicts Presented by the Third Circuit's Decision. As the Petitioners demonstrated (Pet. at 12-16), until the Third Circuit's decision in this case, every circuit court faced with a challenge to an agency rule has applied *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to the substantive provisions of the statute at issue to determine "if the intent of Congress is clear." The Third Circuit's unprecedented approach rejects *Chevron*, subverts plain congressional intent, and permits an executive agency to unconstitutionally veto unambiguous statutory proscriptions. The EEOC's response to the Petition – which mentions *Chevron* exactly once in passing (Opp. at 8) – underscores the fundamental conflicts that have arisen as a result of the Third Circuit's decision.

a. All Agency Action is Governed by *Chevron* and Section 706(2)(A) of the APA. Respondent argues that a reviewing court literally can ignore *Chevron* – and with that the substantive clarity of the ADEA – because the statute contains "express statutory exemption authority." Opp. at 8. The novelty of the EEOC's approach, and its stark conflict with more than two decades of decisions by all the circuits applying *Chevron*, highlight the need for review by this Court.

According to the EEOC, the Third Circuit was correct in disregarding the substance of the ADEA because the agency had more than "ordinary

'rulemaking authority.'" Opp. at 8. The EEOC argues that as long as it announces that an "exemption" is "necessary and proper in the public interest," Opp. at 11, *any* exemption is lawful – regardless of its scope or the clarity of congressional intent to prohibit the *particular* discriminatory practice at issue. Like the circuit court (Pet. at 16), the EEOC does not cite one case that would justify this abject disregard of *Chevron*. On the other hand, there is precedent for the routine application of *Chevron* to the EEOC's exemption authority, as well as to the statutory exemption authority permitted other agencies.[1]

Equally problematic, the EEOC never addresses the circuit conflict that it's approach creates under section 706(2)(A) of the Administrative Procedure Act. As the Petitioners demonstrated (Pet. at 21-24), the plain language of section 706(2)(A) requires courts to set aside "agency action" that is "otherwise not in accordance with law." And every circuit applying the "not in accordance with law" standard has looked to the substance of the statute in a manner that mimics the universal application of *Chevron*. The EEOC's novel theory that the APA review provisions do not

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[1] *See Quinn v. New York State Electric & Gas Corp.*, 569 F. Supp. 655, 661 (N.D. N.Y. 1983) (in successful challenge to EEOC regulation "exempting" apprenticeship programs from the ADEA, court states in dicta that the regulation would be unlawful even if issued as an "exemption" as it was contrary to the substance of the ADEA); *American Maritime Officers v. Hart*, No. 99-1054, 1999 WL 33839612 (D.D.C. 1999) (setting aside action by the Secretary of Labor pursuant to "exemption" authority under the Service Contract Act as contrary to the substance of the statute).

apply to "agency action" that takes the form of an "exemption" is contrary to the plain language of the APA, and in conflict with numerous circuit decisions. Pet. at 22-24.

b. The Third Circuit's Decision Negates Clear Congressional Intent. The EEOC argues that the Third Circuit was correct in focusing exclusively on the decision by Congress (in 1967) to grant "exemption" authority to the enforcing agency.[2] That authority, however, was exercised to erase for all employers the "equal benefit or equal cost" defense explicitly provided by statute. Opp. at 4-5. The EEOC utterly fails to explain how its exemption authority permits the circuit court to ignore the specific intent of Congress which, in 1990, addressed in detail the nuances of age discrimination in employee benefit plans – without any hint by Congress that its meticulously crafted legislation could subsequently be undone by EEOC rulemaking. It would be difficult to imagine circumstances in which the intent of Congress could be more unambiguously expressed, and more flagrantly disregarded.

The EEOC concedes (as it must) that Congress addressed "the precise question at issue" in this case. Pet. at 12 quoting *Chevron*, 467 U.S. at 843. As the Petitioners showed (Pet. at 2-4), Congress addressed the precise issue of age discrimination in all employee benefit plans during its consideration and passage of

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[2] Other than the statutory language itself, there is no other evidence of what Congress intended when it passed the grant of rulemaking authority in section 9 of the ADEA, 29 U.S.C. § 628.

the Older Workers Benefit Protection Act of 1990, Pub. L. 101-433, 104 Stat 978 (1990) ("OWBPA"). Congress incorporated into the substance of the ADEA longstanding administrative regulations governing employee benefits that imposed an "equal benefit or equal cost" standard for compliance, including health care benefits.[3] Pet. at 3. And, commenting directly on the "precise question at issue," Congress stated that:

> The availability of Medicare benefits from the federal government will not justify a reduction in employer-provided retiree health benefits if the result is that, taking the employer-provided and government-provided benefits together, an older retiree is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger retiree.

S. Rep. No. 101-263, at 21-22 (1990).

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[3] The EEOC's reference to the Court's decision in *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004) (Opp. at 11 n. 3) is curious in this context. The entire premise underlying the "equal benefit or equal cost" principle enacted by Congress is recognition of the fact that the cost of some – but not all – employee benefits increases based on age. The challenged rule is in derogation of the accommodation carefully calibrated by Congress to ensure that older individuals were not more expensive to employ. Beyond that, the rule ignores the holding in *Cline* that "[t]he Age Discrimination in Employment Act ... forbids discriminatory preference for the young over the old." 540 U.S. at 590.

In short, the OWBPA and its legislative history confirm that Congress expressly rejected the type of exception for "bridge" health care benefits (Opp. at 2) that the EEOC has attempted to legalize through the challenged exemption.[4]

c. The EEOC's Extreme View of its Exemption Authority Underscores the Constitutional Conflict that the Court Should Resolve. As the Petitioners demonstrated, the decision of the circuit court leads inescapably to a constitutional dilemma. Pet. at 26-30. Under the Third Circuit's ruling, the EEOC's exemption authority is without boundary; it is not circumscribed by congressional intent in any way, and could be used (as it was here) to nullify the specific intent of Congress.

The EEOC's opposition sidesteps this grave constitutional issue by arguing that the ADEA's rulemaking delegation provides an "intelligible principle" needed to satisfy the non-delegation doctrine. Opp. at 11. But the constitutional clash presented here is not an inevitable product of the rulemaking delegation. Rather, it is an unfortunate result of the circuit court's holding that (a) *Chevron* is inapplicable, and (b) congressional intent on the "precise question at issue" can be wholly disregarded in assessing the validity of the challenged rule. Pet. at

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[4] One of only three exceptions to the "equal benefit or equal cost" rule enacted in 1990 permits a defined benefit pension plan to offer social security supplements that terminate on the attainment of the eligibility age for social security benefits. *See* 29 U.S.C. § 623(l)(1)(B)(ii). This is the only "bridge" benefit that Congress permitted. *See* S. Rep. No. 101-263, *supra*, at 21 (referring to the exception as "bridge payments").

24-30. Those errors, in turn, caused the circuit court to run afoul of the "not in accordance with law" standard of section 706(2)(A) of the APA, creating yet another conflict among the circuits. Pet. at 21-24. The EEOC opposition does not address the APA conflict either.

CONCLUSION

For the reasons set forth in the Petition, and those above, the Petition for certiorari should be granted.

Respectfully submitted,

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